MEMORANDUM OF LAW

DATE: March 16, 1994

TO: Bette E. Boone, Board Adjudicator, via Lawrence B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Definition and Applicability of the Preexisting Condition Exclusion Set Forth in San Diego Municipal Code Section 24.0501(b), as it Relates to the Application for Industrial Disability Retirement Filed by Oran B. Johnson

The hearing on the industrial disability application of Oran B. Johnson was held on October 1, 1993. You have requested a legal opinion on the applicability of San Diego Municipal Code ("SDMC") section 24.1120 ┌sicσ, SDMC section 24.0501(b), in this case and ask how you should determine what is considered to be a preexisting condition. In support of your request, you note generally that Mr. Johnson had several injuries while he was a seasonal hourly Lifeguard and not eligible for membership in the San Diego City Employees' Retirement System ("SDCERS"). He also has had several injuries after joining the SDCERS. You now seek guidance on how to determine which of Mr. Johnson's conditions are preexisting conditions and thus excluded from consideration for the award of a disability retirement.

At the outset, we note that the ultimate recommendation regarding Mr. Johnson's application for industrial disability retirement rests squarely with you. At the same time we are sensitive to the confusion spawned by the preexisting condition exclusion found in the SDMC. As such, while it would be inappropriate for us to draw any conclusions regarding the merits of Mr. Johnson's application for industrial disability retirement, we are more than willing to provide the framework for analysis of this much debated exclusion. Our analysis follows.

Background

The origin and evolution of the preexisting condition exclusion for industrial disability retirements currently found in SDMC section 24.0501 has been the subject of much debate and numerous Memoranda of Law, dated August 7, 1991, October 10,

1991, and April 7, 1992. They are attached for your review.

As you recall, disability retirements were eliminated for all employees, hired on or after September 3, 1982, who enrolled into the then newly created 1981 Pension Plan. In fact, one of the driving forces behind the establishment of the 1981 Pension Plan was the elimination of all disability retirements. Needless to say, the elimination of disability retirements was short lived. They were gradually phased back into the 1981 Pension Plan and later the current SDCERS, subject to certain express limitations, one of which was the exclusion for preexisting conditions.

The enactment of SDMC section 24.1120 on September 30, 1985, marked the first step. This section, entitled "Industrial Disability-Safety Member" provided that safety members:

> permanently incapacitated from the performance of duty as the result of physical injury or disease arising out of or in the course of his or her employment; and
>
> 1) not arising from a preexisting medical condition, or
> 2) not arising from a nervous or mental disorder, irrespective of claimed causative factors, shall be retired for disability with retirement allowance, regardless of age or amount of service.

SDMC section 24.1120 was amended on May 15, 1989, to include general members as well. Thus, as of May 15, 1989, industrial disability retirements were available for both general and safety members, subject to the express limitations contained in SDMC section 24.1120.

On February 8, 1993, pursuant to Ordinance No. O-17891 N.S., the exclusions for industrial disability retirements set forth in SDMC section 24.1120 were incorporated into SDMC section 24.0501 and now form the substance of subdivision (b) of this section. In addition, preexisting conditions were defined and further clarified.

The incorporation of SDMC section 24.1120 into SDMC section 24.0501(b) was largely a matter of housekeeping. For all practical purposes, the 1981 Pension Plan (including SDMC section 24.1120) is no more. With the exception of the exclusions for disability retirement set forth in SDMC section 24.0501(b) and the City-Sponsored Group Health Insurance benefit for Eligible

Retirees set forth in Division 12, SDMC sections 24.1201, et. seq., the benefits for the members of the now defunct 1981 Pension Plan are the same as those enjoyed by the members of the SDCERS as it existed before the 1981 Pension Plan.

SDMC section 24.0501 now provides the standard for disability retirements for all members of the SDCERS. Subsection (a) sets forth the requirements for those members enrolled into the SDCERS before September 3, 1982. Subsection (b) sets forth the requirements for those members enrolled into the SDCERS on or after September 3, 1982.

Generally speaking, the requirements for both groups of members are the same. Regardless of membership date, an applicant for an industrial disability retirement must show that he or she is permanently incapacitated from the performance of duty as the result of injury or disease arising out of or in the course of his or her employment.

A member enrolled on or after September 3, 1982, however, has an additional requirement. He or she must also show that the claimed disability did not arise from a preexisting condition or a nervous or mental disorder.

According to SDMC section 24.0501(b)(2), a preexisting condition is defined as: "any condition which occurred or existed prior to membership in the Retirement System. Any medical condition occurring during any mandatory waiting periods prior to eligibility for membership in the Retirement System shall not be considered a preexisting condition."

For your information, the language defining preexisting condition as any condition "which occurred or existed prior to membership in the Retirement System" was the result of negotiations during the meet and confer process, in response to the prior opinions rendered by our office (attached) to the effect that (prior to this amendment) a preexisting condition which arose out of or occurred while an employee was a member of the 1981 Pension Plan when that plan had no disability retirement benefit would be considered a preexisting condition. See generally, Ordinance No. O-17891 N.S., adopted February 8, 1993.

General Discussion of Preexisting Condition

Unlike its counterparts in the Public Employees' Retirement System (Government Code section 21020), the 1937 Act County Retirement Systems (Government Code section 31720) or various other charter provisions with accompanying municipal or county code provisions, SDMC section 24.0501 requires the incapacity to be the result rather than a result of the workplace. In addition, and also unlike its other public retirement system counterparts, SDMC section 24.0501(b) expressly excludes

preexisting conditions and nervous or mental disorders as a basis for an industrial disability award. These distinctions are critical and permissible.

They are critical because the SDCERS has adopted a standard for industrial disability retirements which is more restrictive than that adopted by other public agencies. Under the City's standard, the incapacity must be the result of the workplace. See, Gelman v. Board of Retirement, 85 Cal. App. 3d 92, 97 (1978); Gurule v. Board of Pension Commissioners, 126 Cal. App. 3d 523, 527 (1981). In addition, for those members enrolled into the SDCERS on or after September 3, 1982, the incapacity must not "arise from a preexisting condition or a nervous or mental disorder."

The distinctions are permissible because the City is a charter city. As a charter city, the City "can make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law." Grimm v. City of San Diego, 94 Cal. App. 3d 33, 37 (1979); see also, Bellus v. City of Eureka, 69 Cal. 2d 336, 345-346 (1968). Significantly, charter cities are given full power to provide for the compensation of their employees. Cal. Const., art. XI, section 5, subdivision (b). "It is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution." Grimm at 37.

Practically speaking, the express exclusion for preexisting conditions and nervous and mental disorders has negated the proposition that an employer takes his employee as he finds him. While this proposition may hold true for Workers Compensation or Long Term Disability cases and perhaps also for industrial disability retirements for State or County employees covered by their respective public retirement systems, the same does not hold true for the industrial disability retirements under the SDCERS. See generally, Gelman v. Board of Retirement, 85 Cal. App. 3d 92, 96-98 (1978); Gurule v. Board of Pension Commissioners, 126 Cal. App. 3d 523, 526-529 (1981).

SDCERS does not take its members as it finds them. A disabling injury arising from a preexisting condition cannot support the award of an industrial disability retirement. Moreover, the fact that the injuries sustained by Mr. Johnson prior to membership in the SDCERS occurred while he was a City employee does not change this result. Although this result may at first blush seen harsh, it is consistent with the funding basis of the SDCERS.

SDCERS is an actuarial based contributory system "in which contributions of ┌participating┐ employees and City to the retirement fund are computed upon the basis of actuarial advice designed to estimate the funding needed to accrue a guaranteed retirement allowance upon retirement." International Assn. of Firefighters v. City of San Diego, 34 Cal. 3d 292, 296 (1983); Bianchi v. City of San Diego, 214 Cal. App. 3d 563, 571 (1989). Under this scheme, participating employees and the City make the contributions necessary to fund the array of benefits available to members. Part-time, seasonal and hourly employees are not eligible to participate in the SDCERS pursuant to SDMC section 24.0105. As such, they do not accrue any rights or benefits in the SDCERS. They are eligible, however, for Workers Compensation and the City's Industrial Leave (Administrative Regulation 63.00) program.

Significantly, the preexisting condition exclusion adopted by the City Council recognizes this important distinction. Conditions occurring or existing prior to membership in the SDCERS, regardless of whether the condition occurred during employment with the City (or the Unified Port District), cannot, standing alone, support the award of a disability retirement. Simply stated, the requested benefit has not been funded or promised.

"Thus, while it is the function of the Board to act upon individual cases, the city council has been conferred the authority to control the Board's activities by 'general ordinances.'" Grimm v. City of San Diego, 94 Cal. App. 3d 33, 39 (1979). In this situation, the City Council has spoken. Conditions occurring or existing prior to membership in the SDCERS are preexisting conditions excluded from serving as the basis of an industrial disability retirement. "Although pension legislation is liberally construed in favor of an applicant, the purpose of the rule of liberal construction is to effectuate legislative intent. Neither the board nor the court has authority to allow eligibility for persons obviously excluded from the legislative scheme." Overend v. Board of Administration, 232 Cal. App. 3d 166, 171 (1991).

Given the express statutory differences among the SDCERS and the other public retirement systems operating in the state, the application of the "employer takes the employee as he finds him" standard with its companion line of cases is inappropriate in the context of SDMC section 24.0501. City of Huntington Beach v. Board of Administration, 4 Cal. 4th 462, 469-470 (1992).

With respect to the issue of aggravation or exacerbation of a preexisting condition, it follows that if the initial

preexisting condition is excluded from serving as the basis for an industrial disability retirement, so too are any aggravations or exacerbations. This does not mean, however, that the mere existence of a preexisting condition forestalls the availability of an industrial disability retirement. Each case must be decided on its own set of facts. If the applicant can show by a preponderance of the evidence that the claimed disability did not arise from the preexisting condition, i.e., that the incapacity was the result of the workplace and that it occurred while the applicant was a member of the SDCERS, irrespective of the preexisting condition, then, assuming all other conditions have been met, the applicant would be entitled to a disability retirement.

Factual Background

According to the chronology of events prepared by the Board Adjudicator, Mr. Johnson was hired by The City of San Diego ("City") on June 13, 1976, as a Lifeguard I, seasonal and limited part-time. (Exhibit 20-1:1.) As a part-time seasonal employee, he was not eligible for membership in the SDCERS. On August 2, 1985, he joined the SDCERS as a safety member. (Exhibit 2.) On July 4, 1986, Mr. Johnson changed his employment status from that of a Lifeguard II to a Diver I with its corresponding change in status in the SDCERS from that of a safety member to general member. (Exhibit 20-5.)

During the period of time in which he was not a member of the SDCERS, Mr. Johnson claims that he injured his lower back on August 13, 1976, when a lifeguard tower fell towards him and he strained his back trying to correct the tower's position. (Exhibits 23, 24-1, 24-2, TR 32-33.) There are also references to a lumbosacral strain on June 22, 1981, (Exhibit 17-29:6), a back injury or strain sometime in 1982 (Exhibit No. 6), a back injury on January 5, 1984, when he was holding a vessel off the rock during an after hours rescue (Exhibit 26, TR 44), a stiff back on approximately June 13, 1984, (est. date) (Exhibit 3-2) and a strained neck and upper back on July 22, 1984, following a few days of alleged intense rescue work during this particular summer. (Exhibit TR 43-44.) Finally, there is a reference to a snow skiing accident in approximately 1977. (Exhibits 17-29:6, 17-36:10-11, TR 113.)

After joining the SDCERS in 1985, Mr. Johnson claims that he suffered additional back injuries. He alleges a strained lower back on July 1, 1986, caused by the lifting of a 33-gallon trash can containing wet towels (Exhibits 8-1, 8-2), a lower back injury on March 13, 1987, occasioned by lifting dive gear out of a boat (Exhibits 9-2, 9-4), a strained back on November 11, 1991,

caused by jumping from a boat to the dock to grab the bow line (Exhibit 28, TR 51-53), and an injury to his back on February 5, 1992, suffered while performing normal and customary dive operations (Exhibits 17-25:9, 17-37:1).

On June 17, 1992, Mr. Johnson filed an application for industrial disability retirement to be effective August 22, 1992, pending approval. The nature of his disability: broken vertebrae (3). (Exhibit 1:2.) At his hearing before the Board Adjudicator, Mr. Johnson submitted a variety of documents, including numerous medical reports. He also testified on his own behalf.

Analysis

At the administrative level, Mr. Johnson has the burden of proof in showing entitlement to an industrial disability retirement. To establish such entitlement, he must meet the requirements of Section 141 of the Charter for The City of San Diego ("Charter") and SDMC section 24.0501. Charter section 141 provides generally that a disability retirement may be authorized when there is a causal link between the disability and the workplace and the disability is of such a magnitude or character that it "renders it necessary to retire from active service." SDMC section 24.0501 requires that he show that he is permanently incapacitated from the performance of duty as the result of injury or disease arising out of or in the course of his employment. In addition, having enrolled into the SDCERS after September 3, 1982, he must also show that the claimed disability did not arise from a preexisting condition. In this regard, a preexisting condition is defined in SDMC section 24.0501(b) as "any condition which occurred or existed prior to membership in the Retirement System."

Failure to satisfy any one of these requirements precludes the award of an industrial disability retirement. Moreover, under the preponderance of evidence standard governing the administrative hearing on his application for disability retirement, the evidence he presents in support of his application must have more convincing force than that opposed to it. If the evidence is so evenly balanced that the Board Adjudicator is unable to say that the evidence on either side preponderates, the finding on that issue must be against Mr. Johnson because he had the burden of proving it. (Baji 2.60.)

Importantly, "╒aσ party having the burden of proof before an administrative agency must sustain that burden, and it is not necessary for the agency to show the negative of the issue when the positive is not proved." Lindsay v. County of San Diego Ret. Bd., 231 Cal. App. 2d 156, 161-162 (1966).

It is thus incumbent upon Mr. Johnson to show that his present incapacity, if any, did not arise from those injuries occurring or existing before August 2, 1985. According to the express language of SDMC section 24.0501, these injuries would be considered preexisting conditions. Pursuant to your request for guidance on how to determine which of Mr. Johnson's conditions would be preexisting conditions and thus excluded from consideration for the award of a disability retirement, we have reviewed generally the transcript and record before you. As noted earlier, we offer only general comments. We do not draw conclusions. That is solely your call.

Our brief review of the record indicates numerous references to the injuries occurring or existing before August 2, 1985, as the cause of Mr. Johnson's incapacity. According to Dr. James E. McSweeny, Mr. Johnson recounted to him that his back problems were the result of a "recurrence of preexisting long standing back disorder, which he has acquired arising out of his employment with the City of San Diego as a lifeguard, as well as a ranger/diver." (Exhibit No. 17-25:9.) When reviewing Mr. Johnson's medical records, Dr. McSweeny notes: x-rays show a compression fracture of T12. Diagnosis is a lumbosacral strain with possible radiculopathy. "The x-ray findings were noted to be previous injury and not related to the current injury of June 22, 1981. This is signed by Dr. R. Neveln, M.D., dated June 23, 1981." (Exhibit No. 17-29:6.)

Again, while reviewing Mr. Johnson's medical records, Dr. McSweeny further notes in conjunction with a Doctor's Report of Occupational Injury for an injury dated June 26, 1984, "┌Pσast history of a compression fracture, T12, L1, secondary to skiing injury." (Exhibit 17-29:6.) This report is also referenced by Dr. Robert Tonks. In his report, Dr. Tonks states:

> ┌Tσhe etiology of his post-traumatic arthritis is from the fracture he sustained on T9 and T12, the date of which is unclear. There is no medical evidence to support any fractures. The only reference we have is in a Doctor's First Report in 1984 which indicates the patient had an old skiing accident with a fracture to his thoracic and lumbar spines. The patient states he had a lifeguard station fall over on him in 1976 and that is when the fracture might have occurred. He does not

> remember any medical treatment for a fracture. The recurrent multiple strain injuries the patient had are secondary to the poor mechanics of his back due to the degenerative arthritis after this traumatic injury.

(Exhibit 17-36:11.)

With respect to the old skiing accident, Dr. Tonks further states:

> He has a reported history, by Dr. Simbari on June 27, 1984, of a skiing injury which left him with a compression fracture of the thoracic and lumbar spines. When questioned about this injury, the patient denied that he had any medical treatment for this. The fracture that is noted on the x-ray at T9 is a severe compression fracture which surely would have required medical treatment as it is very painful. This is not the type of fracture that is sustained from a minor injury as he describes. It would cause a severe flexion-type deformity which could occur from a fall, a serious skiing injury, or a motor vehicle accident.

(Exhibit 17-36:10.)

A memorandum dated July 10, 1992, to the Retirement Administrator from an Assistant Deputy Director in Water Production (Exhibit 17-30), provides further references to these earlier injuries. It states in pertinent part:

> Mr. Johnson has had constant problems relating to a back injury he received while employed as a City Lifeguard. About eight years ago Mr. Johnson was moving a portable lifeguard tower at the beach when it started to tip over. He held up the tower and in so doing injured his back. I believe he re-injured his back two other times within the Lifeguard Service before he

> transferred to Water Utilities in 1985. He was hired as a full-time Diver, which in 1988 converted to the title Ranger/Diver. During his time working in Water Production he has had constant light duty time assigned to him because of chronic back pain. I believe it has been five or six times in the last five years.

Mr. Johnson, however, sustained additional injuries after he joined the SDCERS in 1985. In the medical records reviewed by Dr. McSweeny (Exhibit 17-29:8), Dr. McSweeny makes reference to a Doctor's First Report of Occupational Injury for Mr. Johnson for an injury dated July 2, 1986. He notes:

> The date of injury is July 2, 1986. The date of examination is July 2, 1986. History of injury is while lifting a 30 gallon trash can full of wet towels, the patient sustained an injury to the lower back.
>
> Past history is a compression fracture of the thoracic vertebrae. Subjective complaints of low back pain and left sided thigh pain. Objective examination demonstrates paralumbar muscle spasm with diminished range of motion. X-rays demonstrate old compression fracture of T12. Diagnosis is a lumbar strain.

There is another report of a lower back injury dated March 13, 1987. In this report, Mr. Johnson, after lifting diving gear weighing approximately 70 lbs., began feeling soreness in the lower back. "Subjective complaint is low back pain. Objective examination is muscle spasm at the thoracolumbar junction." (Exhibit 17-29:8.) With respect to an industrial claim dated February 5, 1992, Dr. McSweeny notes:

> The patient states that there was no specific trauma relative to the industrial claim dated February 5, 1992, but rather, he feels that this is a recurrence of a pre-existing long standing chronic back disorder, which he has acquired

arising out of his employment with
the City of San Diego as a lifeguard,
as well as a ranger/diver.

(Exhibit 17-25:9.)

The medical reports of Alan Horowitch, M.D. (Exhibit 17-37) and Paul C. Murphy, M.D. (Exhibit 17-38) also discuss Mr. Johnson's claim of industrial injury dated February 5, 1992. Both of these doctors questioned an earlier diagnosis of ankylosing spondylitis made by Dr. McSweeny. Dr. Tonks also disagreed with this diagnosis. (Exhibit 17-36:9.)

With respect to the issue of apportionment, Dr. Horowitch concludes that if Mr. Johnson does not have ankylosing spondylitis then "it is most probable that there are no reasonable grounds for apportionment of his present disability to preexistent factors, other than the repetitive injures ┌sicσ to his back while at work." (Exhibit 17-37:5.) Dr. Murphy, the agreed medical examiner, agrees. He notes that Mr. Johnson's industrial injuries "are the primary and only cause for his current permanent disability." (Exhibit 17-38:10.)

The inquiry, however, does not stop here. Pursuant to the definition of a preexisting condition in SDMC section 24.0501(b), an industrial injury which occurred or existed prior to membership in the SDCERS cannot, standing alone, support the award of an industrial disability retirement. Mr. Johnson bears the burden of showing that the present incapacity did not arise from these earlier injuries.

Moreover, to the extent that the injuries sustained by Mr. Johnson after membership in the SDCERS are aggravations or exacerbations of his earlier injuries, they too would be excluded as preexisting conditions. If, however, Mr. Johnson establishes by a preponderance of the evidence that his present incapacity is the result of these later injuries, irrespective of the earlier injuries then, assuming all other requirements were met, he would be entitled to an industrial disability retirement.

The ultimate resolution of this question rests squarely with you. It is your responsibility to carefully review the evidence submitted in this matter. You must be satisfied that Mr. Johnson has met his burden of proof in establishing the requirements set forth in the Charter and the SDMC for the award of an industrial disability retirement.

Conclusion

The origin, evolution and application of the preexisting condition exclusion has spawned much debate and frustration with regard to the standard of review to be utilized in evaluating applications for disability retirement filed by members who

enrolled into the SDCERS on or after September 3, 1982. Unfortunately, the task is not easy. No bright line exists to guide you, staff, or the Board. Instead, each case must be evaluated on its own set of facts. Our hope is that all interested parties will find the discussion set forth in this memorandum informative and helpful.

We also remind you of our Memorandum of Law, dated September 14, 1993, entitled "Disability Retirements - Standard of Review - Board Rule 17." In particular, it reviews with greater detail the general requirements set forth in Charter section 141 and SDMC section 24.0501.

If you have any further questions, please give me a call.

JOHN W. WITT, City Attorney
By
Loraine L. Etherington
Deputy City Attorney

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Attachments
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